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Regulating Adult Entertainment Establishments in Maine

January 10, 2005

Maine State Planning Office

Matthew Nazar, Director, Land Use Program

Last year, Maine's Legislature made it legal for municipalities to regulate "adult entertainment establishments" through zoning without an adopted, consistent comprehensive plan,. However, if a municipality has a comprehensive plan, the regulations must be consistent with that plan. Towns may regulate the operation of adult amusement stores, adult video stores, adult bookstores, adult novelty stores, adult motion picture theaters, on-site video screening establishments, adult arcades, adult entertainment nightclubs or bars, adult spas, establishments featuring strippers or erotic dancers, escort agencies or other sexually oriented businesses. For the rest of this article these are jointly referred to as "adult businesses".

So what does this mean for Maine towns? What can towns legally regulate? It's not as simple as it may sound, so let's explore some of the possibilities. Much of what will be discussed in this article is related to federal, state, case law. The author is not an attorney, so this article should not be considered legal advice, but rather as guidance if your town is considering adopting this type of regulation. Remember, always have your municipal attorney review any ordinance you propose.

Legislative Authority

Home Rule. 30-A M.R.S.A. § 3001 gives municipalities broad authority to adopt ordinances. But, where the Legislature has preempted or otherwise limited local authority, municipalities may have limited or no authority. Knowing what preemption is and how it may impact municipal authority to enact ordinances is vital to ensuring that local ordinances are enforceable. Many ordinances that a municipality may want to adopt to regulate adult businesses may be adopted

under the broad home rule authority, and be unrelated to zoning discussed below. If you intend to adopt this type of ordinance, make sure that the State Legislature or Federal Constitution has not preempted the local authority to do so. For additional information on the preemption, read "Preemption Doctrine," *Maine Townsman*, June 1991.

Zoning. A "zoning ordinance" is a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district. Many adult business regulations are zoning ordinances, regulating the location of the businesses within the municipality. Unlike most zoning ordinances, 30-A M.R.S.A. § 4314 and 30-A M.R.S.A. § 4352 exempt zoning that regulates adult businesses from having to exist within the context of a comprehensive plan. Because of this exemption, any municipality in Maine can adopt a zoning ordinance regulating adult businesses. As stated earlier, though, if your municipality has an adopted comprehensive plan, your adult business ordinance must be consistent with that plan.

Freedom of Speech

The First Amendment of the U.S. Constitution prohibits Congress from passing any law that abridges the freedom of speech. The Fourteenth Amendment extends that prohibition to states and municipalities. Speech has been defined by the U.S. Supreme Court to include more than just words. It also includes actions or movements that communicate, including most performances before an audience, such as burlesque or other dancing. The test for identifying protected speech is known as the "*O'Brien Test*", which is discussed later. First, there are some limits on

what constitutes speech that should be considered.

Massage parlors can, according to the courts, be banned altogether, because a massage is conducted with no expressive or communicative content. See *Plaza Health Clubs, Inc. v New York* 430 N.Y.S.2d 815 (1980, citing several U.S. Supreme Court dismissals). Maine law regulates massage therapists through 32 M.R.S.A. § 14301 through 14311.

Nude dancing has seen limits placed on it by the U.S. Supreme Court over the past thirteen years. In both *Barnes v Glen Theater, Inc.*, 501 U.S. 560 (1991) and *City of Erie v Pap's A.M.*, 529 U.S. 277 (2000), the U.S. Supreme Court upheld local ordinances requiring dancers to wear at least pasties and a G-string during performances. In the *Glen Theater* case, the Court said that the ordinance was “narrowly tailored” to meet the requirements of the “*O'Brien Test*” protecting free speech. However, Justice Souter indicated that he upheld the ordinance in the *Glen Theater* case only because of the goal of preventing the “secondary effects” of nude entertainment. Those effects would likely be hard to demonstrate for a community theater version of The Full Monty. So clearly defining what you intend to regulate is critical. The *Erie* ordinance appeared to recognize the need for this distinction and did not apply to “legitimate” theater, but that aspect of the ordinance was not explored by the Court.

Maine law speaks to the issue of nudity through 17-A M.R.S.A. § 854 regulating indecent conduct. While this law does not prevent nude dancing, it limits such performances by requiring that they occur in a place where they cannot be observed from a location outside the performance location.

Obscenity is the final layer to peel away when discussing protected speech. Obscenity is speech, but it is not protected. Unfortunately, the problem is identifying obscenity. The seminal obscenity case in the

U.S. is *Miller v California* 413 U.S. 15 (1973), in which the Court stated that obscenity depends on:

1. whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined in the applicable law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Frankly, it would be very difficult for a community to identify something that is obscene based on those criteria. Who's the “average person”? What are “contemporary community standards”? This has been an elusive topic for decades. In 1964, U.S. Supreme Court Justice Potter Stewart famously stated, “... I know it when I see it...” on the topic of obscenity and pornography. If you feel that you could make such a determination, take great care with the details and get significant advice from your municipal attorney.

Maine has not legislated an outright ban on obscenity as some states have, but there are a number of state laws that regulate obscenity. These include the states slightly modified version of the above definition, found in 17 M.R.S.A. § 2911 through § 2913. The statutes are primarily concerned with protecting minors from obscene material. Again, obscenity is not protected speech, and a municipal ordinance can ban it, but such an ordinance would likely be very difficult to enforce because proving something is obscene is difficult.

The O'Brien Test flows from *U.S. v O'Brien* 391 U.S. 367 (1968). It lays out the test used by courts to determine the constitutionality of an ordinance regarding

freedom of speech cases. *O'Brien* involved a draft card burned in protest, not an adult business, but the four-part test outlined in the case is the foundation of all free speech cases since then. The test states that an ordinance will be upheld only if:

1. It is within the constitutional power of the government. This means all constitutional powers, other than the free speech question, of course.
2. It furthers a substantial governmental interest. The term “substantial” is important here. The courts do not give government the benefit of the doubt in these cases, and have the opportunity to second guess legislatures regarding the importance of the ordinance.
3. The governmental interest it furthers is unrelated to the suppression of free speech or expression. This is often called the “content neutral” requirement. In other words, the desire not to have Neo-Nazi or Satan worship literature in town is not a valid reason for an ordinance.
4. The restriction of free expression is no greater than is essential to the furtherance of that substantial interest. This is the “narrowly tailored” test. The municipality cannot restrict speech any more than is absolutely necessary to achieve its interest.

Regulation

So with all of those criteria and limitations, what can a municipality do? What kind of regulation is legal? Here are some broad issues to consider.

The **secondary effects** of adult businesses are the key to meeting several of the points in the *O'Brien* test above. There are numerous studies from around the nation that detail the increase in crime, including prostitution and drug use, the spread of sexually transmitted diseases, and the adverse effect on the value of surrounding properties. But, your municipality does not have to do its

own study of secondary effects. In *City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41 (1986) the U.S. Supreme Court made it clear that it's okay to cite studies of secondary effects, even if those studies were done in other municipalities. A quick search of the internet using your favorite search engine for the phrase “secondary effects of sexually oriented businesses” will turn up hundreds to thousands of references, articles, and studies by a variety of groups. Referencing the secondary effects in detail in a purpose statement is important to ensuring that the reason for regulating the use is clear. Without clear statements about the secondary effects that cause you to regulate adult businesses, the justification for the ordinance is severely weakened.

The courts have provided some further guidance on secondary effects by ruling in *Tollis, Inc. v San Bernardino Cty*, 827 F.2d 1329 (9th Cir 1987) that there was no evidence of secondary effects from the single showing of an “adult” film at a theater. An ordinance that defined a theater as an “adult theater” based upon one showing was deemed too broad and struck down.

Regulating the **location** of adult businesses is perhaps the first issue that many people think about. We know that these businesses are protected by the First and Fourteenth Amendments to the U.S. Constitution, but does that mean we have to allow them anywhere in town? No. There are two basic philosophies to dealing with the location of adult businesses... concentrate them in one place (as in Boston's former Combat Zone) so the police can monitor the secondary effects more easily, or spread them out to limit the concentration, and hopefully the volume, of the secondary effects. The courts have upheld both techniques. The Combat Zone model was upheld in the *Renton* case, and the “spread them out” model was upheld in *Young v American Mini-Theaters* 427 U.S. 50 (1976). In Maine, because of the

size of our cities and towns, the model commonly used is to “spread them out”. In *Young* Detroit, Michigan had an ordinance prohibiting the location of any adult bookstore or theater within 500 feet of a residence or 1000 feet of any similar business. Many towns expand on this model and include requirements for buffers from churches, schools, day cares facilities, and other similar incompatible uses. Remember, these buffers apply to the business at the time it is permitted. If a church decides to move into a storefront next door to an adult bookstore, the bookstore is not in violation of the ordinance and neither is the church. This can set up an uncomfortable situation, but not a situation with legal implications related to the ordinance.

Be careful, however, that you don’t bump up against the other test of location in *Young* and *Renton*, to allow **adequate alternative locations** for adult businesses. In *Renton* only about 5% of the town was available for adult businesses and the U.S. Supreme Court held that that was okay. The businesses have to be allowed, but the locations do not have to be at bargain basement prices. While the City of Renton’s ordinance was upheld as allowing adequate alternative locations, Broward County, Florida’s ordinance was struck down as unconstitutional in *International Eateries v Broward County* 726 F. Supp 1556 (S.D.Fla 1987). The Broward County ordinance listed 26 potential sites for adult businesses, but because of a separate permit requirement, there was, for all practical purposes, only one ¾ acre site where an adult business could be permitted. The lesson is that adequate alternative locations have to exist on the ground, not just on paper. Set out your criteria for location then test them. If your regulations state that adult businesses must be in the Commercial Zone, and at least 1000 feet from any residence, place of worship, day care facility, and school (public or private), see if

any such properties exist in your town. If they don’t, your ordinance is likely to be unconstitutional.

Regulating the **time**, or hours of operation is another typical tactic of adult business ordinances to limit the secondary effects of such businesses. As you might expect, many of the secondary effects of these businesses increase at night. There are a number of federal appeals court cases on this topic including *National Amusements v Town of Dedham*, 43 F.3d 731 (1st Cir 1995) in which the court upheld an ordinance in Dedham, MA, prohibiting the operation of adult theaters between midnight and 6 a.m. The ordinance’s purpose was to control traffic congestion, parking problems, the performance of sexual acts in public, and the discarding of sexually explicit material in the neighborhood.

The final issue typically regulated is the **manner** of operation, or the details of how the business operates. Again, being specific about the secondary effects you are addressing is important. If your regulation requires that lighting in the store be sufficiently bright, specify what activities you are trying to prevent, such as indecent exposure. *Berg v Health & Hospital Corp*, 865 F.2d 797 (7th Cir. 1988) upheld an ordinance requirement that video booths be open on one side to a public room in the store to limit illegal sexual activity known to occur in the booths if they were entirely closed off. Such provisions can be effective at limiting the secondary effects of adult businesses.

There are two significant cautions that municipalities should consider when creating an adult business ordinance, and they both relate back to the *O’Brien* test. First, we advise against the creation of an ordinance where adult businesses have to get a special permit to operate, and other businesses in town do not. While not expressly prohibited, such a requirement can easily violate the third test of *O’Brien*... that regulations on free

speech must be content neutral (see *FW/PBS Inc. v City of Dallas* 110 S. Ct. 596 (1990)). Many of the existing models in Maine towns and around the country require special licensing of adult businesses. Think carefully and consult your attorney on this topic before you follow the lead of another town on this. Second, do not create an ordinance that is vague or overbroad. This would violate the fourth test of *O'Brien*... that restrictions on free speech must be narrowly tailored. Adult business ordinances must be extremely specific about what they regulate, what standards apply, and why the regulation is necessary. This is not the time to be discreet or squeamish, if you expect your ordinance to withstand a court challenge. Clearly define all of your terms, including terms regarding human anatomy or specific sexual activity. Set clear standards regarding the use. And

create a purpose statement that covers every possible secondary effect you are trying to limit. Ordinances have been struck down for using vague terms like “1000 feet from residential area” or “specializing in the sale of adult products” or “a substantial or significant portion of the stock is adult products”. All of these phrases are vague and have been deemed by courts as an unconstitutional attempt to restrict free speech.

The secondary effects of adult businesses are legitimate concerns for communities to address through regulation. The limiting of constitutionally protected speech that a group of people in your community finds objectionable is not. Take great care when you write an ordinance that limits the rights guaranteed to all citizens in the U.S. Constitution. That care starts by involving your municipal attorney.

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The State Planning Office has created a model Adult Entertainment Establishment ordinance. The possibilities regarding how to fit such an ordinance into an existing local ordinance are widely varied. Planners rarely create anything from scratch, and SPO recommends that municipalities use the model ordinance and borrow from existing ordinances in other communities to create an ordinance that fits your community's needs. Make sure the final product is seamlessly integrated. Remember the advice in the article above, and use the reference material listed at the end of the article. Remember to always get the approval of your municipal attorney before proposing any ordinance regulating adult businesses.

MODEL ADULT ENTERTAINMENT ESTABLISHMENT ORDINANCE **FOR MAINE**

Maine State Planning Office
January 21, 2005

Note that when searching for model or sample ordinances on this topic on the internet or elsewhere, the more common generic term used is “sexually oriented business”, rather than “adult entertainment establishment”.

A significant amount of this regulation can be eliminated or pared down if it is incorporated into a local zoning ordinance. **DO NOT ADOPT THIS MODEL ORDINANCE WITHOUT TAILORING IT TO YOUR COMMUNITY, AND WITH GUIDANCE FROM YOUR MUNICIPAL ATTORNEY.**

PREAMBLE

WHEREAS, adult entertainment establishments require special supervision in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the communities where they locate, and

WHEREAS, the *City Council/Town Name* finds that adult entertainment establishments are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the municipality that demands reasonable regulation of adult entertainment establishments in order to protect the health and well-being of the citizens; and

WHEREAS, there is convincing documented evidence that adult entertainment establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the reduction of property values; and

WHEREAS, it is recognized that adult entertainment establishments, due to their nature, have serious objectionable operational characteristics, particularly when they are located in proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the *City Council/Town Name* wants to prevent these adverse effects and thereby protect the health, safety and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance that addresses the secondary effects of adult entertainment establishments as well as the health problems associated with such businesses; and

**NOW, THEREFORE, BE IT ORDAINED BY THE _____ OF
THE _____, as follows:**

SECTION I. Purpose and Findings.¹

¹ The United States Supreme Court has held that non-obscene, sexually explicit materials and entertainment are protected by the First Amendment. Notwithstanding, the Court has stated that government may regulate adult entertainment establishments in order to eliminate or control the adverse secondary effects caused by these businesses. These adverse secondary effects include, but are not limited to, crime, sexually transmitted diseases, urban blight, and declining property values.

A. Purpose. It is the purpose of this ordinance to regulate adult entertainment establishments and related activities to promote the health, safety, and general welfare of the citizens of the municipality, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult entertainment establishments within the *City*. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.² Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene materials.

B. Findings.³ Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the City Council, and on findings incorporated in the cases of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, (1986); *Iacobucci v. City of Newport, Ky.*, 479 U.S. 92 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *California v. LaRue*, 409 U.S. 109 (1972);

Enactment of legislation regulating adult entertainment establishments must be supported by factual findings of adverse secondary effects made by the enacting body.

² Courts normally review content-based restrictions on speech under “strict scrutiny” review, and require government to show a “compelling state interest” for the restriction. However, the Supreme Court has stated that, because restrictions on sexually explicit speech are justified without reference to the content of the regulated speech, the proper level of review is whether the regulation is narrowly tailored to a substantial government interest. *See City of Renton v. Playtime Theaters*, 475 U.S. 41, 48 (1986); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Here, the substantial government interest is combating adverse secondary effects. If the ordinance targeted the speech itself, the test would be strict scrutiny, a burden almost impossible to meet.

³ Findings may be supported by studies conducted by other cities, by the city’s own study, or by findings of a court. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862-64(8th Cir. 2003). Nevertheless, it is important that the legislating body state the findings on the record prior to enactment, and note that the purpose of the ordinance is to combat adverse secondary effects. *See, e.g., Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, No. 02-12281 (11th Cir. July 15, 2003); *Lakeland Lounge v. Jackson*, 973 F.2d 1255, 1259 (5th Cir. 1992)(where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the council members did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the council members, the language of the preamble shows the city council’s awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance”).

United States v. O'Brien, 391 U.S. 367 (1968); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir.1986); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir.1995); *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir.1984); and *N.W. Enterprises v. City of Houston*, 27 F.Supp. 2d 754 (S.D. Tex.1998)), as well as studies conducted in other cities¹ including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group On the Regulation Of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), and statistics from the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the City Council finds that:

1. Adult entertainment establishments lend themselves to ancillary unlawful and unhealthy activities that are presently uncontrolled by the operators of the establishments. Further, there is presently no mechanism to make owners of these establishments responsible for the activities that occur on their premises.
2. Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where adult entertainment establishments are located. *See, e.g.*, Studies of the cities of Phoenix, Arizona; Indianapolis, Indiana; and Austin, Texas.
3. Sexual acts, including masturbation, and oral and anal sex, occur at adult entertainment establishments, especially those which provide private or semi-private booths or cubicles for viewing films, videos, or live sex shows. *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 111 (1972); *See also* Final Report of the Attorney General's Commission on Pornography (1986) at 377.
4. Offering and providing such booths and/or cubicles encourages such activities, which creates unhealthy conditions. *See, e.g.*, Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.
5. Persons frequent certain adult theaters, adult arcades, and other adult entertainment establishments, for the purpose of engaging in sex within the premises of such adult entertainment establishments. *See, e.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986); *see also* Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.
6. At least 50 communicable diseases may be spread by activities occurring in adult entertainment establishments including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A,

¹ The Fifth Circuit has held that the studies cited in the model ordinance may be insufficient to demonstrate a factual basis for zoning regulation targeting materials for off-site viewing. *See Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 294-295 (5th Cir. 2003). The Tenth Circuit, however, has expressly held that certain of the land use studies cited in the model ordinance are sufficient to establish the necessary factual basis for zoning regulations for both on-site and off-site viewing. *See ZJ Gifts v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998) *See also id.*, n.1 (citing land use studies of Garden Grove, California; Austin, Texas; Oklahoma City, Oklahoma; Indianapolis, Indiana; Minneapolis, Minnesota; Whittier, California; and Amarillo, Texas).

Non B amebiasis, salmonella infections, and shigella infections. *See, e.g.*, Study of Fort Meyers, Florida.

7. As of June, 2001, the total number of reported cases of AIDS in the United States caused by the immunodeficiency virus (HIV) was 793,025. *See, e.g.*, Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at www.cdc.gov.
8. The total number of cases of genital chlamydia trachomatis infections in the United States reported in 2000 was 702,093, a 6% increase over the year 1999. *See, e.g.*, Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at www.cdc.gov.
9. The total number of cases of early (less than one year) syphilis in the United States reported during the twelve-year period 1996-2000 was 212,672. *See, e.g.*, Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at www.cdc.gov.
10. The number of cases of gonorrhea in the United States reported annually remains at a high level, with a total of 1,730,911 cases reported during the period 1996-2000. *See, e.g.* Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at www.cdc.gov.
11. The surgeon general of the United States in his report of October 22, 1986, advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug use, exposure to infected blood and blood components, and from an infected mother to her newborn.
12. According to the best scientific evidence available, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts. *See, e.g.* Findings of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at www.cdc.gov.
13. Numerous studies and reports have determined that bodily fluids, including semen and urine, are found in the areas of adult entertainment establishments where persons view "adult" oriented films. *See, e.g.*, Final Report of the Attorney General's Commission on Pornography (1986) at 377.
14. Nude dancing in adult establishments encourages prostitution, increases sexual assaults, and attracts other criminal activity. *See, e.g.*, *Barnes v. Glen Theatre*, 501 U.S. 560, 583 (1991).
15. Nude dancing in adult establishments increases the likelihood of drug-dealing and drug use. *See, e.g.*, *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1056 (9th Cir.1986).
16. Alcohol consumption in adult establishments increases the likelihood of crime, illegal drug use, and illegal sexual activity, and encourages undesirable behavior that is not in the interest of the public health, safety, and welfare. *See, e.g.*, *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir.2000); *Sammy's Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998), *cert. denied*, 529 U.S. 1052, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000).
17. The findings noted in paragraphs numbered (1) through (18) raise substantial governmental concerns.
18. Adult entertainment establishments have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns.

19. Removal of doors on adult booths and requiring sufficient lighting on the premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in adult establishments.
20. The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of the adult entertainment establishment, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted diseases and criminal activity.
21. The general welfare, health, and safety of the citizens of this City will be promoted by enactment of this ordinance.
22. When more than one adult entertainment establishment use occupies the same location or business address, the secondary effects caused by such businesses are increased. Secondary effects are eliminated or controlled to a greater degree when only a single adult entertainment establishment use is allowed to occupy the same location.

SECTION II. Definitions.

1. **ADULT AMUSEMENT STORE** means the same as **ADULT BOOKSTORE**.
2. **ADULT ARCADE** means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, videos, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."
3. **ADULT BOOKSTORE** means a commercial establishment that, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:
 - a. books, magazines, periodicals or other printed matter, or photographs, films, motion picture, video cassettes or video reproductions, slides, or other visual representations that are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas;" or
 - b. instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

A principal business purpose exists if materials offered for sale or rental depicting or describing "specified sexual activities" or "specified anatomical areas" occupy 20% or more of total floor space. A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as **ADULT BOOKSTORE**. Such other business purposes will not serve to exempt such commercial establishments from being categorized as an **ADULT BOOKSTORE** so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials that depict or describe "specified sexual activities" or "specified anatomical areas."

4. **ADULT CABARET** means a nightclub, bar, restaurant, café, or similar commercial establishment that regularly, commonly, habitually, or consistently features:
 - a. persons who appear in a state of nudity or semi-nudity; or
 - b. live performances that are distinguished or characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
 - c. films, motion pictures, video cassettes, slides, photographic reproductions, or other image producing devices that are distinguished or characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
 - d. persons who engage in "exotic" or erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customers.
5. **ADULT ENTERTAINMENT ESTABLISHMENT** means the operation of adult amusement stores, adult video stores, adult bookstores, adult novelty stores, adult motion picture theaters, on-site video screening establishments, adult arcades, adult entertainment nightclubs or bars, adult spas, establishments featuring strippers or erotic dancers, escort agencies or other sexually oriented businesses.
6. **ADULT ENTERTAINMENT NIGHTCLUB OR BAR** means the same as ADULT CABARET.
7. **ADULT MOTEL** means a hotel, motel or similar commercial establishment that:
 - a. offers accommodation to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas;" and has a sign visible from the public right of way that advertises the availability of this adult type of photographic reproductions; or
 - b. offers a sleeping room for rent for a period of time that is less than twenty-four (24) hours; or
 - c. allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than twenty-four (24) hours.
8. **ADULT MOTION PICTURE THEATER** means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly, commonly, habitually, or consistently shown that are distinguished or characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
9. **ADULT NOVELTY STORE** means the same as ADULT BOOKSTORE.
10. **ADULT THEATER** means a theater, concert hall, auditorium, or similar commercial establishment that regularly, commonly, habitually, or consistently features persons who appear, in person, in a state of nudity and/or semi-nudity, and/or live performances that are distinguished or characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

11. **ADULT VIDEO STORE** means the same as **ADULT BOOKSTORE**.
12. **EMPLOYEE** means a person who performs any service on the premises of a adult entertainment establishment on a full time, part time, contract basis, or independent basis, whether or not the person is denominated an employee, independent contractor, agent, or otherwise, and whether or not the said person is paid a salary, wage, or other compensation by the operator of said business. "Employee" does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises, or for the delivery of goods to the premises, nor does "employee" include a person exclusively on the premises as a patron or customer.
13. **ESCORT** means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.
14. **ESCORT AGENCY** means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.
15. **ESTABLISHMENT** means and includes any of the following:
 - a. the opening or commencement of any adult entertainment establishment as a new business;
 - b. the conversion of an existing business, whether or not a adult entertainment establishment, to any adult entertainment establishment;
 - c. the additions of any adult entertainment establishment to any other existing adult entertainment establishment; or
 - d. the relocation of any adult entertainment establishment; or
 - e. an adult entertainment establishment or premises on which the adult entertainment establishment is located.
16. **ESTABLISHMENTS FEATURING STRIPPERS OR EROTIC DANCERS** means the same as **ADULT CABARET**.
17. **LIVE THEATRICAL PERFORMANCE** means a play, skit, opera, ballet, concert, comedy, or musical drama.
18. **NUDE MODEL STUDIO** means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons for consideration.
19. **NUDITY** or a **STATE OF NUDITY** means the appearance of a human anus, pubic area, male genitals, or female genitals with less than a fully opaque covering; or a female breast with less than a fully opaque covering of any part of the areola; or human male genitals in a discernibly turgid state even if completely and opaquely covered.

20. **ON-SITE VIDEO SCREENING ESTABLISHMENT** means the same as ADULT ARCADE.

21. **PERSON** means an individual, proprietorship, partnership, corporation, association, or other legal entity.

22. **PREMISES** means the real property upon which the adult entertainment establishment is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the adult entertainment establishment, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control, or supervision of the licensee, as described in the application for a business license pursuant to Section IV of this ordinance.

23. **SEXUAL ENCOUNTER CENTER** means a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration:

- a. physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
- b. activities between persons of the opposite sex and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nudity.

A principal business purpose exists if the services offered are intended to generate business income.

24. **SEXUALLY ORIENTED BUSINESS** means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

25. **SPECIFIED ANATOMICAL AREAS** means:

- a. the human male genitals in a discernibly turgid state, even if fully and opaquely covered;
- b. less than completely and opaquely covered human genitals, pubic region, buttocks, or a female breast below a point immediately above the top of the areola.

26. **SPECIFIED SEXUAL ACTIVITIES** means and includes any of the following:

- a. the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts, whether covered or uncovered;
- b. sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- c. masturbation, actual or simulated; or
- d. excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

27. **SUBSTANTIAL ENLARGEMENT** of a adult entertainment establishment means the increase in floor areas occupied by the business by more than twenty-five (25%) percent, as the floor areas existed on _____, 200____.

SECTION III. Location Restrictions.²

Adult entertainment establishments shall be permitted in district(s) _____, _____, and _____ provided that:

A. the adult entertainment establishment may not be operated within:

1. 1,500³ feet of a church, synagogue, mosque, temple or building which is used primarily for religious worship and related religious activities;
2. 1,500 feet of a public or private educational facility including but not limited to child care facility, nursery schools, preschools, kindergartens, elementary schools, private schools, intermediate schools, junior high schools, middle schools, high schools, vocational schools, secondary schools, continuation schools, special education school, junior colleges, and universities; school includes the school ground, but does not include the facilities used primarily for another purpose and only incidentally as a school;
3. 1,500 feet of a public park or recreational area which has been designated for park or recreational activities including but not limited to a park, playground, nature trails, swimming pool, reservoir, athletic field, basketball or tennis courts, skating rink, pedestrian/bicycle paths, wilderness areas, or other similar public land within the village which is under the control, operation, or management of the village park and recreation authorities;
4. 1,500 feet of the property line of a lot zoned for residential use and devoted to a residential use as defined in the zoning code; or
5. 1,500 feet of another adult entertainment establishment.

² Locational restrictions may be maintained in either of two ways: one, a distance requirement like the one set forth here, or “clustering,” that is, requiring sexually oriented businesses to locate only in a small specified zone.

³ While adult entertainment establishments can be regulated, they cannot be banned through an overly burdensome zoning scheme. The Supreme Court requires that zoning schemes “allow for reasonable alternative avenues of communication.” *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (upholding 1,000 foot distance requirement). Ordinarily, a land use study must be conducted to determine whether a proposed zoning scheme is constitutionally permissible, *i.e.*, whether there are a sufficient number of alternative sites based upon the distance or clustering requirements. For example, a 1,500 foot distance requirement may not allow for enough alternative sites, while a 1,000 or 750 foot distance requirement may. Zoning schemes are particularly vulnerable to constitutional attack when no land use study has been conducted.

- B. An adult entertainment establishment may not be operated in the same building, structure, or portion thereof, containing another adult entertainment establishment.
- C. For the purpose of this ordinance, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a adult entertainment establishment is conducted, to the nearest property line of the premises of a church, synagogue, regular place of worship, or public or private elementary or secondary school, or to the nearest boundary of an affected public park, lot containing a residence, district not listed at the beginning of this section, or licensed child care facility.
- D. For purposes of subsection (C) of this section, the distance between any two adult entertainment establishment uses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

SECTION IV. Non-Conforming Uses; Amortization.⁴

- A. Any business lawfully operating on the effective date of this ordinance that is in violation of the locational or structural configuration requirements of this ordinance shall be deemed a non-conforming use. The non-conforming use will be permitted to continue for a period not to exceed five years, unless sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such non-conforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more adult entertainment establishments are within 1,500 feet of one another and otherwise in a permissible location, the adult entertainment establishment that was first established and continually operated at a particular location is the conforming use and the later-established business(es) is non-conforming.
- B. An adult entertainment establishment lawfully operating as a conforming use is not rendered a non-conforming use by the location of a church, synagogue, or regular place of religious worship, public or private elementary or secondary school, licensed child care facility, public park, or residential use within 1,500 feet of the adult entertainment establishment, provided the rights of the adult entertainment establishment have vested prior to the location of one of the uses or structures listed in this subsection. Vesting shall have occurred if the owner/applicant for the adult entertainment establishment:
 1. exercised due diligence in attempting to comply with the law;

⁴ Amortization in Maine is an uncertain practice. “Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations.” *Lovely v. Zoning Board of*

Appeals of City of Presque Isle, 259 A.2d 666 (Me. 1969); *Frost v. Lucey*, 231 A.2d 441 (Me. 1967); *Oliver v. City of Rockland*, 710 A.2d 905 (Me. 1998). Please consult your municipal attorney specifically regarding this section.

2. demonstrated good faith throughout the proceedings;
3. expended substantial unrecoverable funds in reliance on the planning board's approval;
4. The period during which an appeal could have been taken from the approval of the application has expired; and
5. There is insufficient evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the project as approved.

SECTION V. Additional Regulations for Adult Motels.

- A. Evidence that a sleeping room in a hotel, motel, or a similar commercial enterprise has been rented and vacated two or more times in a period of time that is less than ten (10) hours creates a rebuttable presumption that the enterprise is an adult motel as that term is defined in this ordinance.
- B. It is unlawful if a person, as the person in control of a sleeping room in a hotel, motel, or similar commercial enterprise that does not have a adult entertainment establishment license, rents or subrents a sleeping room to a person and, within ten (10) hours from the time the room is rented, he/she rents or subrents the same sleeping room again.
- C. For purposes of subsection (B) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SECTION VI. Additional Regulations For Escort Agencies.

- A. An escort agency shall not employ any person under the age of 18 years.
- B. A person commits an offense if the person acts as an escort or agrees to act as an escort for any person under the age of 18 years.

SECTION VII. Additional Regulations For Nude Model Studios

- A. A nude model studio shall not employ any person under the age of 18 years.
- B. A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

SECTION VIII. Regulations Pertaining to Exhibition of Sexually Explicit Films and Videos.

- A. A person who operates or causes to be operated a adult entertainment establishment, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, or other video reproduction, that depicts

specified sexual activities or specified anatomical areas, shall comply with the following requirements:

1. A manager's station may not exceed thirty-two (48) square feet of floor area.
2. It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
3. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of the entire area of the premises to which any patron is permitted access for any purpose, including video viewing booths, and excluding only restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of the entire area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.
4. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the view area specified in subsection (3) of this section remains unobstructed at all times. No doors, walls, partitions, curtains, merchandise, display racks, or other object(s) shall obstruct from view of the manager's station any portion of the premises to which patrons have access.
5. The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candle as measured at the floor level.
6. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the illumination described above is maintained at all times that any patron is present in the premises.
7. No viewing room or booth may be occupied by more than one person at any time.
8. No opening of any kind shall exist between viewing rooms or booths.
9. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that no more than one person at a time occupies a viewing booths or rooms, and to ensure that no person attempts to make an opening of any kind between the viewing booths or rooms.
10. The operator of the adult entertainment establishment shall, each business day, inspect the walls between the viewing booths to determine if any openings or holes exist.
11. The operator of the adult entertainment establishment shall cause all floor coverings in viewing booths to be nonporous, easily cleanable surfaces, with no rugs or carpeting
12. The operator of the adult entertainment establishment shall cause all wall surfaces and ceiling surfaces in viewing booths to be constructed of, or permanently covered by, nonporous, easily cleanable material. No wood, plywood, composition board or other porous material shall be used within forty eight (48") inches of the floor.

SECTION IX. Exterior Portions of Adult Entertainment Establishments.

- A. It shall be unlawful for an owner or operator of an adult entertainment establishment to allow the merchandise or activities of the establishment to be visible from a point outside the establishment.
- B. It shall be unlawful for the owner or operator of an adult entertainment establishment to allow the exterior portion of the adult entertainment establishment to have flashing lights, or any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any manner except to the extent permitted by the provisions of this ordinance.
- C. It shall be unlawful for the owner or operator of an adult entertainment establishment to allow exterior portions of the establishment to be painted any color other than a single achromatic color. This provision shall not apply to an adult entertainment establishment if the following conditions are met:
 - 1. The establishment is a part of a commercial multi-unit center; and
 - 2. The exterior portions of each individual unit in the commercial multi-unit center, including the exterior portions of the business, are painted the same color as one another or are painted in such a way so as to be a component of the overall architectural style or pattern of the commercial multi-unit center.
 - 3. Nothing in this article shall be construed to require the painting of an otherwise unpainted exterior portion of a adult entertainment establishment.

SECTION X. Signage.

- A. Notwithstanding any other city ordinance, code, or regulation to the contrary, it shall be unlawful for the operator of any adult entertainment establishment or any other person to erect, construct, or maintain any sign for the adult entertainment establishment other than the one (1) primary sign and one (1) secondary sign, as provided herein.
- B. Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:
 - 1. not contain any flashing lights;
 - 2. be a flat plane, rectangular in shape;
 - 3. not exceed seventy-five (40) square feet in area; and
 - 4. not exceed ten (10) feet in height or ten (10) feet in length.
- C. Primary signs shall contain no photographs, silhouettes, drawings or pictorial representations in any manner, and may contain only the name of the enterprise.
- D. Each letter forming a word on a primary sign shall be of solid color, and each such letter shall be the same print-type, size and color. The background behind such lettering on the display surface of a primary sign shall be of a uniform and solid color.
- E. Secondary signs shall have only one (1) display surface. Such display surface shall:
 - 1. be a flat plane, rectangular in shape;
 - 2. not exceed twenty (20) square feet in area;
 - 3. not exceed five (5) feet in height and four (4) feet in width; and
 - 4. be affixed or attached to any wall or door of the enterprise.

F. The provisions of item (1) of subsection (B) and subsection (C) and (D) shall also apply to secondary signs.

SECTION XI. Persons Younger Than Eighteen Prohibited From Entry; Attendant Required.

- A. It shall be unlawful to allow a person who is younger than eighteen (18) years of age to enter or be on the premises of an adult entertainment establishment at any time the adult entertainment establishment is open for business.
- B. It shall be the duty of the operator of each adult entertainment establishment to ensure that an attendant is stationed at each public entrance to the adult entertainment establishment at all times during such adult entertainment establishment's regular business hours. It shall be the duty of the attendant to prohibit any person under the age of eighteen (18) years from entering the adult entertainment establishment. It shall be presumed that an attendant knew a person was under the age of eighteen (18) unless such attendant asked for and was furnished:
 1. a valid operator's, commercial operator's, or chauffeur's driver's license; or
 2. a valid personal identification certificate issued by the State of Maine reflecting that such person is eighteen (18) years of age or older.

SECTION XII. Hours of Operation

No adult entertainment establishment, except for an adult motel, may remain open at any time between the hours of 12:00 P.M. and 6:00 A.M

SECTION XIII. Exemptions.

- A. It is a defense to prosecution under this ordinance that a person appearing in a state of nudity did so in a modeling class operated:
 1. by a public school, licensed by the State of Maine, a college, junior college, or university supported entirely or partly by taxation;
 2. by a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation.
- B. Notwithstanding any other provision in this ordinance, movies rated G, PG, PG-13, or R, by the Motion Picture Association of America (MPAA), or live theatrical performances with serious artistic, social, or political value, that depict or describe specified anatomical areas or specified sexual activities, are expressly exempted from regulation under this ordinance. (*See Schultz v. City of Cumberland*, 26 F.Supp. 2d 1128, 1144 (W.D.Wisc.1998)).

SECTION XIV. Separability.

If any section, subsection, or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

SECTION XV. Conflicting Ordinances Repealed.

All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION XVI. Effective Date.

This ordinance shall be enforced from and after _____.